FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 26 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 183

B. H. INNESS BROWN, DAVID PAINE, ETHELBERT WARFIELD, et al.,

Petitioners,

vs.

JOHN GERDES and JAMES D. CARPENTER, JR., Trustees of Reynolds Investing Co., Inc., Debtor,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITIONERS' BRIEF

DAVID PAINE,
LAWRENCE S. GREENBAUM,
WILLIAM C. SCOTT,
Solicitors for Petitioners.

THEODORE S. JAFFIN,
JAMES F. DWYER,
of Counsel.

INDEX

	PAGE
STATEMENT	1
OPINIONS BELOW	2
GROUND OF JURISDICTION	2
STATEMENT OF THE CASE	2
Proceedings Below	6
Lien Proceedings in State Court	6
Proceedings in New York Appellate Division	7
Proceedings in the Court of Appeals	7
SPECIFICATION OF ERROR	7
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	8
QUESTIONS PRESENTED	9
SUMMARY OF ARGUMENT	10
POINT I—The prosecution by the Debtor and the Trustees of the suits in the State Court with the express and unqualified authorization of the Bankruptcy Court conferred jurisdiction upon the State Court to determine and enforce the Attorneys' liens upon such suits pursuant to the New York Lien Law	11
A. By virtue of the New York Attorneys' Lien Law, litigation handled by New York attorneys is charged with a lien in their favor	12
B. A trustee in bankruptcy coming into the state court is subject to the same conditions as any other litigant	16
C. A trustee in bankruptcy is subject to State attorneys' lien laws	17

PAGE

POINT II—The attempt by the Trustees to substitute themselves in place of the Attorneys in charge of the suits in the State Court subjected the Trustees to such conditions as that Court might impose, including the fixing and enforcement of the Attorneys' liens 23

POINT III—Under Section 77B, in effect when Action No. 1 was instituted, jurisdiction over such action and its incidents was never in the Bankruptcy Court but became vested exclusively in the State Court 26

A. Since Action No. 1 was commenced while Section 77B was in effect, the jurisdiction of the Bankruptcy Court must be determined by that section 27

B. Under Section 77B the Bankruptcy Court had no jurisdiction over *in personam* claims of a Debtor against third persons 28

1. The law immediately prior to Section 77B 28

2. Section 23 and the limitations upon the Bankruptcy Court's jurisdiction over *in personam* actions are applicable to 77B proceedings 29

POINT IV—Neither the Constitution nor the Federal reorganization statutes prohibit the State Court from fixing liens upon causes of actions prosecuted in that Court with the authorization of the Bankruptcy Court 36

A. Section 77B, not Chapter X, is applicable to Action No. 1. Under it there is no immunity to Trustees from local lien laws 37

B. Chapter X has not conferred upon trustees in reorganization immunity from attorneys' lien laws 37

PAGE

POINT V—The determination and enforcement of the Attorneys' liens by the State Court is not inconsistent with any alleged contract or agreement made by the Attorneys with the Trustees or the Bankruptcy Court 45

CONCLUSION—The order of the Court of Appeals should be reversed and the orders of the Supreme Court affirmed by the Appellate Division should be reinstated 49

APPENDICES

(SEPARATELY BOUND)

Appendix A—Chronology 1

Appendix B—Federal Statutes 4

CASES CITED

	PAGE
Arkansas Corp. Commission v. *Thompson*, 313 U. S. 132 (1941)	17
Bardes v. *Haworden Bank*, 178 U. S. 524 (1900)	29
Beecher v. *Vogt Manufacturing Company*, 227 N. Y. 468 (1920)	13
Boteler v. *Ingels*, 308 U. S. 57 (1939)	16, 23, 38
Bovay v. *H. M. Byllesby & Co.*, 88 F. (2d) 990 (C. C. A. 5th, 1937)	34
Bush v. *Elliott*, 202 U. S. 477 (1906)	29
Cup Craft Paper Corp. v. *Federal Paper Board Co.*, 262 N. Y. App. Div. 91 (1941), *aff'd* 289 N. Y. 671 (1942)	17
Davis v. *Friedlander*, 104 U. S. 570 (1882)	17
Emil v. *Hanley*, 318 U. S. 515 (1943)	23, 38, 44
Ex parte Baldwin, 291 U. S. 610 (1934)	40
Fisher-Hansen v. *Brooklyn Heights R.R. Co.*, 173 N. Y. 492 (1903)	15
Fischer v. *Pauline Oil & Gas Co.*, 309 U. S. 294 (1940)	17
Foust v. *Munson S.S. Lines*, 299 U. S. 77 (1936)	12n, 16, 40
Fraenkl v. *Cerecedo*, 216 U. S. 295 (1910)	28
Gerdes v. *Reynolds*, 28 N. Y. Supp. (2d) 622 (1941)	4
Goodrich v. *McDonald*, 112 N. Y. 157 (1889)	13, 14
Gross v. *Irving Trust Co.*, 289 U. S. 342 (1933)	40
In re Austin, 42 F. Supp. 889 (E. D. N. Y. 1942)	21
In re Badger, 9 F. (2d) 560 (C. C. A. 2d, 1925)	14
In re Baxter & Co., 154 Fed. 22 (C. C. A. 2d, 1907)	14

CASES CITED (continued)

	PAGE
In re Bay Ridge Inn, 94 F. (2d) 555 (C. C. A. 2d, 1938)	36
In re Cup Craft Paper Corp., 40 F. Supp. 927 (S. D. N. Y. 1941), *aff'd sub nom. New York Credit Mens Assn.* v. *Schlesinger*, 126 F. (2d) 472 (C. C. A. 2d, 1942)	17, 20
In re East River Towing Co., 266 U. S. 355 (1924)	38
In re Mount Forest Fur Farms of America, Inc., 122 F. (2d) 232 (C. C. A. 6th, 1939)	34
In re Neely, 113 Fed. 210 (C. C. A. 2d, 1902)	17
In re Prima Co., 98 F. (2d) 952 (1938), *cert. den. sub nom. Keig* v. *Harris Trust & Savings Bank*, 305 U. S. 658 (1939)	32, 33
In re Prudence Company, Inc., 96 F. (2d) 157 (C. C. A. 2d, 1938), *cert. den.* 305 U. S. 616 (1938)	18, 21n, 22, 35, 37
In re Prudence Bonds Corp., 75 F. (2d) 262 (C. C. A. 2d, 1935)	33, 39
In re Pyrocolor Corp., 46 F. (2d) 554 (S. D. N. Y. 1930)	14
In re San Juan Gold, Inc., 96 F. (2d) 60 (C. C. A. 2d, 1938)	14
In re Standard Gas & Electric Co., 119 F. (2d) 658 (C. C. A. 3rd, 1941)	27, 30, 34, 39
Inness-Brown, et al. v. *Gerdes, et al.*, 264 N. Y. App. Div. 852 (1942), *rev'd* 290 N. Y. 468 (1943)	2, 7, 46
Isaacs v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931)	40
Kelley v. *Gill*, 245 U. S. 116 (1917)	29
Larkin v. *Frazier*, 224 N. Y. 421 (1918)	49

CASES CITED (continued)

	PAGE
Marine Harbor Properties v. *Manufacturers Trust Co.*, 317 U. S. 78 (1942)	23, 45
Martucci v. *Brooklyn Children's Aid Society*, 284 N. Y. 408 (1940)	14
Matter of Atterbury, 222 N. Y. 355 (1918)	15
Matter of Heinsheimer, 214 N. Y. 361 (1915)	13, 14
Matter of King, 168 N. Y. 53 (1901)	14, 15, 21n
Matter of Krooks, 257 N. Y. 329 (1931)	14, 48
Matter of Levy, 249 N. Y. 168 (1928)	13
Matter of Montgomery, 272 N. Y. 323 (1936)	14, 48
Matter of Tillman, 259 N. Y. 133 (1932)	14, 48
Matter of Weitling, 266 N. Y. 184 (1935)	14, 48
Meyer v. *Kenmore Granville Hotel Co.*, 297 U. S. 160 (1936)	30
Nic Projector Corp. v. *Movie-Jecktor Co.*, 16 F. Supp. 605 (S. D. N. Y. 1935)	14
Northeastern R. E. Sec. Corp. v. *Goldstein*, 276 N. Y. 64 (1937)	43
O'Connor v. *Mills*, 300 U. S. 26 (1937)	30
Ohio Oil Co. v. *Thompson*, 120 F. (2d) 831 (C. C. A. 8th, 1941), *cert. den.* 314 U. S. 658 (1941)	16, 17, 18, 21
Ohlquist v. *Nordstrom*, 143 N. Y. Misc. 502 (1932), *aff'd* 238 N. Y. App. Div. 766 (1933), *aff'd* 262 N. Y. 696 (1933)	49
Palmer v. *Massachusetts*, 308 U. S. 79 (1939)	23, 31, 38, 39, 44
Panama Railroad Company v. *Johnson*, 264 U. S. 375 (1924)	38
Park v. *Cameron*, 237 U. S. 616 (1915)	29

CASES CITED (continued)

	PAGE
Robertson v. *Railroad Labor Board*, 268 U. S. 619 (1925)	23, 38
Robinson v. *Rogers*, 237 N. Y. 467 (1924)	14
Schoenherr v. *Van Meter*, 215 N. Y. 548 (1915)	17
Schumacher v. *Beeler*, 293 U. S. 367 (1934)	29
Sherman v. *Buckley*, 119 F. (2d) 280 (C. C. A. 2d, 1941), *cert. den.* 314 U. S. 657 (1941)	2, 17, 18, 20, 21, 22 25, 37, 42
State of Texas v. *Donaghue*, 302 U. S. 284 (1937)	12n, 40
Stevens Co. v. *Foley*, 67 Utah 578, 248 Pac. 815 (1926)	17
Taubel-Scott-Kitzmiller Co. v. *Fox*, 264 U. S. 426 (1924)	29
The Siren, 7 Wall 152 (1869)	16n
Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940)	12n, 16, 40
Thompson v. *Terminal Shares, Inc.*, 104 F. (2d) 1 (C. C. A. 8th, 1939)	33, 44
Tilton v. *Model Taxi Corp.*, 112 F. (2d) 86 (C. C. A. 2d, 1940)	28, 34
U. S. v. *The Thekla*, 266 U. S. 328 (1924)	16n
United States v. *Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C. C. A. 9th, 1936)	34
Winchester v. *Heiskell*, 119 U. S. 450 (1886)	17

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

	PAGE
UNITED STATES:	
Constitution	6, 22, 23
Article I, Sec. 8, Cl. 4	2, 8, 9
Bankruptcy Act	2, 6, 17, 43
Chapter X	2, 3, 9, 10, 11, 22, 26, 27, 28, 30, 37, 38, 39, 41, 42, 43, 44
Chapter XI	20
Section 11,	
subdivision c	34, 38n
subdivision e	38n
Section 23	27, 29, 30, 31, 32, App. 4
Section 40	41n
Section 48	41n
Section 62	41, 42, 47, App. 5
Section 67	App. 6
Section 77	33, 39
Section 77B (Chap. VII)	9, 10, 11, 22, 26, 27, 28, 29, 30, 33, 34, 35, 37
Subdivision a	31, 32, 39
Subdivision c	42n
Subdivision c(9)	41n, 42n
Subdivision k	29, 30
Subdivision o	39

STATUTES AND CONSTITUTIONAL PROVISIONS CITED (continued)

	PAGE
Section 102	27n, 38n
Section 111	39, App. 6
Section 114	39, App. 6
Section 116	App. 7
Section 148	App. 7
Section 206	41, 42n, App. 7
Section 216	App. 7-8
Section 221	App. 8
Section 227	App. 9
Section 241	41, 41n, 47, App. 9
Section 242	41, 41n, App. 9
Section 243	41, 41n, App. 10
Section 244	41, 42n, App. 10
Section 245	41, 42n, App. 11
Section 246	41, 42n, App. 11
Section 247	41, 42n, App. 11
Section 248	41, 42n, App. 12
Section 249	41, 42n, App. 12
Section 250	41, 42n, App. 13
Section 256	App. 13
Section 257	App. 13
Section 258	App. 13
Judicial Code:	
Section 237 (b)	2
Section 256	8, 39, App. 4

STATUTES AND CONSTITUTIONAL PROVISIONS CITED (continued).

	PAGE
Public Laws, No. 696, 75th Cong. (1938)	27n
Revised Statutes, § 711, March 3, 1911, c. 231	40n
Statutes at Large:	
36 Stat. 1160	40n
48 Stat. 921	29
52 Stat. 840, 843	27n
United States Code:	
11 U. S. C. § 207 (k)	29
28 U. S. C. § 344 (b)	2
28 U. S. C. § 371	39, App. 4
NEW YORK:	
Judiciary Law:	
Section 474	45
Section 475	1, 6, 7, 8, 9, 10, 12, 45, 47, 48

OTHER AUTHORITIES CITED

PAGE

Doub, Corporate Reorganizations under Chapter X of the National Bankruptcy Act, 3 Maryland L. Rev., p. 1 (Dec. 1938) 44n

Douglas, Improvement in Federal procedure for Corporate Reorganizations, 24 Amer. Bar Assn. Journal, p. 875 (November 1938) 44n

Finletter, Principles of Corporate Reorganization (1937), pp. 186-187 34

Finletter, The Law of Bankruptcy Reorganization (1939), Chap. 3 ..... 44n

Geydes, Changes Effected by Chapter X of the Bankruptcy Act, 52 Harvard L. Rev., p. 1 (November 1938) 44n

House Report No. 1409 of the Committee on Judiciary, 75th Congr., 1st Sess., July 29, 1937, pp. 45-46 ..... 42n

Laporte, Changes in Corporate Reorganization Procedure, proposed by the Chandler and Lee Bills, 51 Harv. L. Rev., p. 672 (February 1938) 44n

Remington on Bankruptcy, 4th Ed., Vol. 5, Sec. 2131, pp. 243-244 16
Sec. 2189, p. 316 29

Senate Rep. No. 1916 of the Committee on the Judiciary, May 27, 1938 ..... 39, 41

Teton, Reorganization Revised, 48 Yale L. Journal, 573 (February 1939) 44n

Weiner, Corporate Reorganizations under the Chandler Act, 72 U. S. Law Rev., p. 388 (July 1938) 44n

Supreme Court of the United States

OCTOBER TERM, 1943

No. 183

B. H. Inness Brown, David Paine, Ethelbert Warfield, et al.,

Petitioners,

vs.

John Gerdes and James D. Carpenter, Jr., Trustees of Reynolds Investing Co., Inc., Debtor,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

PETITIONERS' BRIEF

Statement

The case is here on certiorari to review a decision of the New York Court of Appeals which determined, by vote of 4 to 3, that the New York Supreme Court was precluded from fixing and enforcing the attorneys' liens claimed by petitioners herein under Section 475 of the New York Judiciary Law, upon causes of action prosecuted in the State Court on behalf of the Debtor in reorganization and its Trustees with the authorization of the Bankruptcy Court. The basis of the decision, which reversed a contrary ruling by a unanimous Appellate Division affirming Special

Term of the Supreme Court and dismissed the lien proceeding for lack of jurisdiction, was that exclusive jurisdiction to fix fees for petitioners' services was vested in the Bankruptcy Court by virtue of the Constitution of the United States (Art. 1, § 8, Cl. IV) and the Bankruptcy Act (Chap. X).

Opinions Below

The Special Term of the Supreme Court (Justice WALTER), wrote opinions which are not officially reported but appear at pages 98 to 109 of the Record. The Appellate Division affirmed without opinion, such affirmance being reported in 264 N. Y. App. Div. 852 (R. 118-119). The opinion of the Court of Appeals is reported in 290 N. Y. 468 (R. 124-129). The three dissenting Judges (LEHMAN, C.J., LOUGHRAN and CONWAY, JJ.) relied upon *Sherman* v. *Buckley*, 119 F. (2d) 280, *cert. den.* 314 U. S. 657. 290 N. Y. 476 (R. 129).

Grounds of Jurisdiction

Certiorari was applied for under Section 237(b) of the Judicial Code (28 U. S. C., § 344[b]) and was granted by this Court on October 11, 1943 (R. 133). A federal question is involved.

Statement of the Case*

Proceedings for the reorganization of Reynolds Investing Co., Inc. (referred to as the Debtor) under Section 77B of the Bankruptcy Act were instituted on May 18, 1938 in the United States District Court of New Jersey (R. 11, 98). On August 1, 1938, some months prior to the approval of the petition, the Bankruptcy Court (Judge FAKE) by

* A chronology is contained in Appendix A, pp. 1 to 3, separately bound.

specific order authorized the Debtor to commence an action in the Supreme Court of New York (referred to as the State Court) to enforce and collect certain claims in favor of the Debtor against its former officers and others, based upon breaches of trust and conversion of company assets, and to retain petitioners herein (referred to as the Attorneys) to prosecute the action (R. 12, 98, 125). On August 4, 1938, prior to the effective date of Chapter X of the Bankruptcy Act (i.e., Sept. 22, 1938), such action (referred to as Action No. 1) was commenced in the State Court in accordance with the order of the Bankruptcy Court (R. 12, 98).

In this action and two others presently to be discussed the liens in question arose.

On January 19, 1939, subsequent to the effective date of Chapter X, the Bankruptcy Court after hearings held before it entered an order approving the petition for reorganization and appointing John Gerdes and James D. Carpenter, Jr., respondents here, as Trustees of the Debtor (referred to as the Trustees). The order authorized the Trustees to be substituted as parties plaintiff and to continue Action No. 1 (R. 12, 98). The Trustees, upon their own application, were duly substituted as parties plaintiff in the action by order of the State Court dated February 10, 1939 (R. 12, 98).

Two other actions were commenced in 1940 in the State Court by the Trustees with the Attorneys representing them under the order of the Bankruptcy Court (R. 13, 16-19, 98); one against the former directors of the Debtor based upon other breaches of trust (referred to as Action No. 2); the other against Globe Indemnity Co. upon fiduciary bonds covering the corporate officers (referred to as the Globe Action). Action No. 1 is the principal action; the other two are of comparatively minor importance so far as the extent of the Attorneys' services is concerned.

After extensive preparation, the Attorneys brought Action No. 1 to trial in January, 1941 before Mr. Justice

WALTER of the Supreme Court, New York County. The trial consumed six weeks, and at the conclusion thereof the Attorneys were successful in obtaining an interlocutory judgment dated April 24, 1941 holding the principal defendants liable to the Debtor and directing that they account to the Trustees in hearings before a referee, Mr. Dunn* (R. 14-15, 98). The Attorneys conducted such hearings; thereafter the Referee filed a report which was confirmed, and final judgments were entered on November 5, 1941. The judgments were obtained against ten defendants, ranging in amounts up to $1,310,109.13 (R. 15).

On June 3, 1941, while the Attorneys were conducting the hearings before the Referee in Action No. 1, the Trustees (who are members of the bar) notified the Attorneys by letter that they were taking over all pending matters in the Attorneys' hands "except the conduct of the hearings before Referee Dunn"; that they were relieving the Attorneys "henceforth of the burden and responsibility of the litigation"; that "this applies as well to the second cause of action now pending" (Action No. 2); and that they themselves were going to handle pending appeals and the collection of the judgments in the first action (R. 20, 22-23, 98-99). This notification was given five months before final judgment was entered in Action No. 1 and while the other two actions were pending untried, issue having been joined.† It was not based upon any claim

---

* The decision of the Court is reported in 28 N. Y. Supp. (2d) 622-667.

† The Trustees in their brief in opposition to the petition for certiorari departed from the Record and stated that the Globe Action was abandoned and that neither the Attorneys nor the Trustees believe that there is a reasonable prospect of recovery. They further stated that Action No. 2 was settled. These statements are incorrect. The Globe Action was never abandoned; issue was joined and no steps whatever taken to withdraw or discontinue it. Action No. 2 was pending and at issue at the time the Attorneys were relieved of their duties, and the settlement referred to took place months later.

As Justice WALTER found: "The other two actions have not yet been tried and are still pending undetermined" (R. 98).

of neglect or wrongdoing on the part of the Attorneys, but solely upon the absolute prerogative of a client to change his attorneys (R. 20, 99).

In their notification of June 3, 1941 the Trustees requested the Attorneys to make available papers and memoranda relating to the litigation. By letter dated June 4, 1941 the Attorneys advised the Trustees that they would accede to such request when their fees and disbursements were paid (R. 23-24, 99).

On June 20, 1941 the Trustees commenced a proceeding in the Bankruptcy Court before Judge FAKE to direct the Attorneys to turn over their papers and memoranda. The motion was resisted by the Attorneys on the ground that the actions having been commenced in the State Court with the authority of the Bankruptcy Court, all incidents in connection with such actions, including the nature and extent of their possessory and charging liens and the enforcement thereof in accordance with the New York Lien Laws, were vested exclusively in the State Court (R. 20, 99). After argument in the Bankruptcy Court the Trustees withdrew their motion pursuant to a stipulation dated July 9, 1941 and signed "SO ORDERED" by Judge FAKE. This stipulation and order provided among other things (R. 24-26, 99) that the Attorneys would "commence proceedings in the state courts of New York for the fixation of their said liens, if any" and "will consent to the substitution" of the Trustees or other attorneys in the pending actions; that the stipulation and order did not constitute a waiver by the Attorneys "of their attorneys' liens, if any, or any other rights which they may possess, under the laws of the State of New York, and all such rights are hereby reserved"; and that the Trustees reserved the right to challenge the jurisdiction of the State Court.

The Trustees' letter of June 3, 1941, and the stipulation and order of July 9, 1941, are of importance in view of the position taken by the Trustees that the Attorneys were not discharged.

Proceedings Below

Lien Proceeding in State Court

In accordance with the stipulation and order of the Bankruptcy Court, the Attorneys in December, 1941 instituted a proceeding in the State Court to fix and enforce their liens on the three actions pursuant to Section 475 of the Judiciary Law (R. 9-26). To avoid misconception it is essential to point out that the services for which the Attorneys sought to impress liens related solely and exclusively to services performed by them in the State Court in prosecuting the actions (R. 16, 19, 21). No fees of any nature have ever been received for such services.

The Trustees interposed an answer to the petition in the State Court objecting to the jurisdiction of that Court to fix the liens, contending that exclusive jurisdiction over the State Court causes of action and the Attorneys' fees was vested in the Bankruptcy Court under the Constitution of the United States and the Bankruptcy Act; further, that the Attorneys had agreed inferentially with the Bankruptcy Court that their compensation should be fixed by that Court (R. 26-27). The Attorneys interposed a reply containing an absolute denial of any such agreement (R. 68). The State Court entered an order (R. 4-5) overruling the Trustees' jurisdictional objection and wrote a comprehensive opinion on the subject which, among other things, negatived the existence of any such agreement as alleged by the Trustees (R. 98-109).

After the disposition of the jurisdictional issue the State Court conducted hearings upon the merits and entered a final order fixing the value of the Attorneys' services in Action No. 1 at $100,000; in Action No. 2 at $2,000 and in the Globe Action at $750; and fixed liens upon the causes of action for the foregoing respective amounts (R. 6-8). The award in Action No. 1 was based upon upwards of 8,800 hours of services and an extended trial resulting in

substantial judgments for the Trustees. Another important factor which the Court took into consideration was the availability through stipulation of the voluminous record in Action No. 1 for use by the Trustees in a similar pending action instituted by them in Virginia against other defendants over whom jurisdiction could not be obtained in New York (R. 15-16, 19, 111-113).

Proceedings in the Appellate Division

The Trustees appealed from the order overruling their jurisdictional objection and the order fixing the Attorneys' liens. The Appellate Division, First Department, all five justices concurring, affirmed the orders without opinion (264 N. Y. App. Div. 852) (R. 118-119).

Proceedings in the Court of Appeals

As of right, upon the ground that the construction of the Constitution was directly involved (R. 116-117), and by permission granted, the Trustees appealed to the Court of Appeals (R. 121-122).

That Court by vote of 4 to 3 reversed both orders and dismissed the proceedings (290 N. Y. 468) (R. 129-130), expressly noting in its statement of the nature of the appeal that it was an appeal on constitutional grounds (R. 124). Motion for reargument was denied by the Court of Appeals on May 27, 1943 (290 N. Y. Mem., p. 324) (R. 130-131).

Specification of Error

The Court of Appeals erred in holding that the Supreme Court of New York did not have jurisdiction to fix the liens of the Attorneys under the New York Judiciary Law, Section 475, upon the causes of action prosecuted in the State Court under the specific and unqualified order of the Bankruptcy Court.

Constitution and Statutes Involved

Federal Constitution

Article I, § 8, Cl. 4

"The Congress shall have power to establish • • • uniform laws on the subject of Bankruptcies throughout the United States."

Federal Statutes

The provisions of Section 256 of the Judicial Code and sections of the Federal Bankruptcy Act will be found in Appendix B, pages 4 to 13 (separately bound).

New York Lien Law

Section 475 of the New York Judiciary Law (Consol. Laws, Chap. 30) reads as follows:

> "§ 475. *Attorney's lien in action, special or other proceeding.*
>
> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

Questions Presented

1. Where a Debtor in Reorganization proceedings pursuant to Chapter VIII (Sec. 77B) of the Bankruptcy Act, retains attorneys and commences a plenary suit in a State Court, under specific order of the Bankruptcy Court, to enforce claims against third persons, and the Trustees of the Debtor, appointed under Chapter X of the Bankruptcy Act, are thereafter substituted as parties plaintiff in such action and prosecute it by the same attorneys, also under the specific order of the Bankruptcy Court, do Article 1, Section 8, Clause IV of the Constitution of the United States, and the corporate reorganization provisions of the Bankruptcy Act preclude the State Court from determining and enforcing, under Section 475 of the Judiciary Law of New York State, the lien of such attorneys upon such cause of action, or the proceeds thereof, for their unpaid compensation for services in the action?

2. Where a Debtor in reorganization proceedings pursuant to Chapter VIII (Sec. 77B) of the Bankruptcy Act, and its Trustees, appointed later under Chapter X, retain attorneys and prosecute a plenary suit in a State Court under specific order of the Bankruptcy Court, to enforce claims against third persons, and the Trustees thereafter discharge the attorneys without cause before they have completed their services, and seek to substitute themselves pro se, or others as attorneys, does the State Court have jurisdiction to fix the lien of the discharged attorneys upon the causes of action in the State Court, and the proceeds thereof, as a condition of granting the substitution; or does the Constitution of the United States (Art. 1, § 8, Cl. IV) and the Bankruptcy Act (Chaps. VIII and X) vest in the Bankruptcy Court exclusive jurisdiction to fix the attorneys' fees and preclude the State Court from proceeding under Section 475 of the New York Judiciary Law?

3. Where Trustees of a Debtor in Federal reorganization proceedings, under specific order of the Bankruptcy Court, commence or intervene in, and prosecute, plenary actions in a State Court upon choses in action in favor of the Debtor, do they thereby submit themselves to the jurisdiction of the State Court as to all incidents of such actions, including the determination of attorneys' liens thereon under Section 475 of the New York Judiciary Law?

4. Does a Bankruptcy Court, under Chapter VIII of the Bankruptcy Act (Sec. 77B), have jurisdiction as against a State Court, of a cause of action in favor of the Debtor, which must be and is prosecuted by plenary suit in such State Court, together with the incidents of such suit, including the determination of the attorneys' lien?

5. Did the Bankruptcy Court, by virtue of the subsequent enactment of Chapter X, ever obtain jurisdiction over the causes of action which, under its order, were commenced in the State Court while the Bankruptcy Court was proceeding under Chapter VIII (Sec. 77B)?

Summary of Argument

1. The State Court had jurisdiction to fix the Attorneys' liens upon the causes of action on the following grounds:

(a) The causes of action upon which the liens were fixed were prosecuted by the Debtor and its Trustees by the express and unqualified order of the Bankruptcy Court. This constituted a submission to the jurisdiction of the State Court respecting all incidents of the litigation including the determination and enforcement of the Attorneys' liens (Point I, p 11, *infra*).

(b) The Trustees, by seeking a substitution of themselves as attorneys in the State Court, subjected themselves to such conditions as that court might impose, including

the liquidation of liens of the Attorneys (Point II, p. 23, *infra*).

2. Under Section 77B, which was in effect when Action No. 1 was instituted, jurisdiction over such action and its incidents was never in the Bankruptcy Court, but became vested exclusively in the State Court (Point III, p. 26, *infra*).

3. Neither Section 77B nor Chapter X prohibited the State Court from fixing liens upon causes of action prosecuted in that Court with the authorization of the Bankruptcy Court (Point IV, p. 36, *infra*).

4. The determination and enforcement of the liens by the State Court is not inconsistent with any alleged contract or agreement made by the Attorneys with the Trustees or the Bankruptcy Court (Point V, p. 45, *infra*).

POINT I

The prosecution by the Debtor and the Trustees of the suits in the State Court with the express and unqualified authorization of the Bankruptcy Court conferred jurisdiction upon the State Court to determine and enforce the Attorneys' liens upon such suits pursuant to the New York Lien Law.

Assuming for the purposes of this Point that the Bankruptcy Court originally had jurisdiction of the causes of action in favor of the Debtor and the Trustees, Justice WALTER supported the jurisdiction of the State Court to fix and enforce the liens upon the following principal ground, among others:

> "I am of the opinion that the short, simple, conclusive and all sufficient answer to the contention of the trustees is that first the bankrupt and then they them-

selves, both with the approval and by direction of the bankruptcy court, voluntarily became active litigants in this court with petitioners as their attorneys, and they thereby submitted themselves to the jurisdiction of this court respecting all incidents of that litigation * * *. Asserting a claim in a court is a waiver of immunity from its process at least as to that claim and its incidents [Citing cases]" (R. 99).

After analyzing the provisions of the Bankruptcy Act and the relevant decisions* he concluded (R. 108):

"The bankruptcy court thus may and sometimes should permit state courts to determine rights and questions affecting property which is either actually or constructively in its possession, and where, as here, the bankruptcy court has authorized the institution of actions in this court, and the trustees have become litigants in this court through attorneys authorized by them and by the bankruptcy court, there can be no doubt of the jurisdiction of this court to carry the litigation through to its end, including the incident of fixing and enforcing the attorney's lien (*Sherman* v. *Buckley*, 119 Fed. 2d, 280 [*cert. den.* 314 U. S. 657]: *Ohio Oil Co.* v. *Thompson*, 120 Fed. 2d, 831, 836, second column [*cert. den.* 314 U. S. 658]). Choice was made when the trustees became parties to the litigation in this court. They cannot revoke that choice now."

This decision is sound in its reasoning and is supported by the authorities, as will presently appear.

A. By virtue of the New York Attorneys' Lien Law, litigation handled by New York attorneys is charged with a lien in their favor.

Section 475 of the Judiciary Law provides:

"From the commencement of an action * * * in any court * * * the attorney who appears for a party has

* Including, among others, *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, 86 (1936); *State of Texas* v. *Donoghue*, 302 U. S. 284 (1937); *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940), discussed *infra*.

> a lien upon his client's cause of action * * * which attaches to a verdict * * * judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come * * *."

And that

> "The court upon the petition of the client or attorney may determine and enforce the lien."

By this section the State of New York, in order to protect its attorneys, has placed a condition upon the right of litigants who seek access to a court in the State by granting a charging lien to the attorney upon the client's cause of action, the judgment and proceeds thereof. Thus, at the threshold of his relationship with a New York attorney a litigant is put on notice that from that time forward his claim or cause of action is burdened with a lien subject to determination by a tribunal located in New York.

The nature, extent and enforcement of such charging lien under the foregoing section of the Judiciary Law (which is similar to provisions in other States) have been clearly defined by the New York courts. Briefly summarized:

1. The lien is a right granted to the attorney to have the proceeds of his client's cause of action applied to the payment of his charges for services rendered in connection with the action.. *Goodrich* v. *McDonald*, 112 N. Y. 157, 162-165 (1889); *Matter of Heinsheimer*, 214 N. Y. 361 (1915).

2. It is a substantive right,—the attorney being regarded as in the position of an "equitable assignee" of the client's cause of action *pro tanto*. *Beecher* v. *Vogt Manufacturing Company*, 227 N. Y. 468, 472 (1920); *Matter of Levy*, 249 N. Y. 168, 169 (1928).

3. Under the statute, the lien now attaches from the commencement of the action or suit, thus modifying the common law rule under which the lien did not

arise until judgment was recovered. *Matter of Heinsheimer, supra*, p. 365.

4. The statute is all-inclusive in its language and contains no exception in favor of a Trustee in Bankruptcy or anyone else—it "has provided a lien in all cases." *Robinson* v. *Rogers*, 237 N. Y. 467, 472 (1924).

5. The right to the lien is not dependent upon proof that there is no other adequate security. It exists in every instance "and not merely where the client fails to provide some other form of security or protection, and the courts cannot themselves substitute another form of protection for that provided in the statute." *Robinson* v. *Rogers, supra*, p. 472.

6. The lien is recognized by the Federal Courts and is not invalidated by bankruptcy. *In re Baxter & Co.*, 154 Fed. 22, 25 (C. C. A. 2d, 1907); *In re Badger*, 9 F. (2d) 560 (C. C. A. 2d, 1925); *In re San Juan Gold, Inc.*, 96 F. (2d) 60 (C. C. A. 2d, 1938); *Nic Projector Corp.* v. *Movie-Jecktor Co.*, 16 F. Supp. 605 (S. D. N. Y. 1935); *In re Pyrocolor Corp.*, 46 F. (2d) 554 (S. D. N. Y., 1930).

7. Where an attorney has not been discharged for good cause he may enforce his lien immediately, his right to payment being on a *quantum meruit* basis. *Matter of Krooks*, 257 N. Y. 329 (1931); *Matter of Tillman*, 259 N. Y. 133 (1932); *Matter of Weitling*, 266 N. Y. 184 (1935); *Matter of Montgomery*, 272 N. Y. 323 (1936); *Martucci* v. *Brooklyn Children's Aid Society*, 284 N. Y. 408 (1940).

8. The attorney's lien is determinable and enforcible in the court in which suit was brought and where the attorneys' services were rendered. *Goodrich* v. *McDonald, supra*; *Matter of King*, 168 N. Y. 53 (1901).

In a word, as Mr. Justice WALTER pointed out (R. 104), the essence of the charging lien is "a right in the attorney

to have the court in which the client's suit was brought so to control its own judgments and processes as to see that the attorney is paid before the client gets any recovery into his own hands."

The fixed policy of the New York courts has been to construe the statute liberally in the interests of the attorneys sought to be protected. *Fisher-Hansen* v. *Brooklyn Heights R. R. Co.*, 173 N. Y. 492 (1903).

An apt illustration of the applicability of this section to an administrator or trustee acting under appointment in another state is found in *Matter of King*, 168 N. Y. 53 (1901), in which a New Jersey testamentary trustee commenced an action in the Supreme Court of New York and succeeded through his New York attorney in recovering certain securities which had been wrongfully hypothecated. He then sought to remove these securities from the State without paying his attorney. A proceeding was instituted by the attorney to fix and enforce his lien, and the trustee contended that the New York court lacked jurisdiction. The Court of Appeals, upholding the contention of the attorney, stated (pp. 59-60):

> "The trustee now desires to remove the securities from this state into the state of New Jersey. The securities are under the custody and control of the courts of this State * * *. The services of the attorneys claiming the lien were rendered in this state in an action pending in the courts of this state, resulting in a recovery of the property now sought to be charged with the lien. Our courts have jurisdiction thereof, and now have the power to determine what is fair and reasonable compensation and the amount for which the lien should be established."

See also:

Matter of Atterbury, 222 N. Y. 355 (1918).

B. A Trustee in Bankruptcy coming into the State Court is subject to the same conditions as any other litigant.

It has been consistently recognized that a federal trustee in bankruptcy or a trustee in reorganization who becomes an active litigant in a state court occupies the same status as any other litigant.* *Remington on Bankruptcy*, 4th Ed., Vol. 5, Sec. 2131, pp. 243-244; *Ohio Oil Co.* v. *Thompson*, 120 F. (2d) 831 (C. C. A. 8th, 1941), *cert. den.* 314 U. S. 658 (1941); see *Boteler* v. *Ingels*, 308 U. S. 57 (1939); *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, (1936); *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940).

In *Ohio Oil Co.* v. *Thompson*, *supra*, the Court (THOMAS, C. J.) stated (p. 836-7):

> "It has often been affirmed in cases of bankruptcy that, although the courts of the United States have exclusive jurisdiction 'of all matters and proceedings in bankruptcy', or, as stated in the opinion of the Supreme Court in this case, 'an exclusive and non-delegable control over the administration of an estate in its possession', when a trustee, having been given authority to do so, appears in a state court to litigate his right to property the state court has jurisdiction of all the incidents of the litigation, and its judgment in such action is binding upon him [Citing cases including *Sherman* v. *Buckley*, 119 F. (2d) 280 (C. C. A. 2d, 1941) *cert. den.* 314 U. S. 657 (1941).]"

---

* Even the Government of the United States, which is immune from suit without its consent, upon voluntarily becoming a party to a legal proceeding "submits to the application of the same principles by which justice is administered between private suitors" (*The Siren*, 7 Wall. 152 [1869]); or, as Mr. Justice HOLMES stated: "When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *U. S. v. The Thekla*, 266 U. S. 328, 339-340 (1924); see other cases cited by Mr. Justice WALTER (R. 99).

Consonant with the rule thus expressed, it has been held that a trustee in bankruptcy is liable as any other litigant for fees and costs (*In re Neely*, 113 Fed. 210 [C. C. A. 2d, 1902]); he is bound by all adjudications made in the state court proceedings (*Fischer* v. *Pauline Oil & Gas Co.*, 309 U. S. 294 [1940]; *Schoenherr* v. *Van Meter*, 215 N. Y. 548 [1915]; *Arkansas Corp. Commission* v. *Thompson*, 313 U. S. 132 [1941]; *Winchester* v. *Heiskell*, 119 U. S. 450 [1886]; *Davis* v. *Friedlander*, 104 U. S. 570 [1882]); his adversary may interpose counterclaims and set-offs (*Ohio Oil Co.* v. *Thompson*, *supra*); and he may even be found guilty of contempt of the state court (*Stevens Co.* v. *Foley*, 67 Utah 578, 248 Pac. 815 [1926]). It is also clear that all proceedings and processes in the state court to enforce a judgment whether through the sheriff, by supplementary proceedings or otherwise, are available to him.

C. A Trustee in Bankruptcy is subject to State attorneys' lien laws.

As an application of the rule that a trustee appointed under the Bankruptcy Act occupies the same status as another litigant in a state court, it has been expressly held that, if, with the authority of the bankruptcy court, he invokes the aid of the state courts to press a claim in favor of the bankrupt or the estate, he accepts this privilege *cum onere* and submits to the jurisdiction of the state court to fix and determine the liens of the attorneys prosecuting the action. Arguments that this constitutes an interference with the exclusive jurisdiction of the bankruptcy court have been rejected. *Sherman* v. *Buckley*, 119 F. (2d) 280 (C. C. A. 2d, 1941), *cert. den.* 314 U. S. 657 (1941); *Cup Craft Paper Corp.* v. *Federal Paper Board Co.*, 262 N. Y. App. Div. 91 (1941), *aff'd* 289 N. Y. 671 (1942); *In re Cup Craft Paper Corp.*, 40 F. Supp. 927 (S. D. N. Y., 1941), *aff'd sub nom. New York Credit Mens. Assn.* v. *Schlesinger*, 126 F. (2d) 472 (C. C. A. 2d, 1942); *Ohio Oil*

Co. v. Thompson, 120 F. (2d) 831 (C. C. A. 8th, 1941), *cert. den.* 314 U. S. 658 (1941), *supra;* see also *In re Prudence Company, Inc.*, 96 F. (2d) 157 (C. C. A. 2d, 1938), *cert. den.* 305 U. S. 616 (1938).

Sherman v. Buckley

The decision of the Second Circuit Court of Appeals in the *Sherman* case (119 F. [2d] 280), upon which Justice WALTER relied and Chief Judge LEHMAN and Judges LOUGHRAN and CONWAY rested their dissent, is directly in point.

One Gould, by Buckley & Buckley, his attorneys, brought an action in the New York Supreme Court resulting in a judgment dismissing the complaint. In January, 1934, while an appeal was pending, Gould was adjudicated a bankrupt and a trustee (Sherman) was appointed by the District Court in Connecticut. The trustee then procured authorization of his bankruptcy court to proceed with the New York action in the name of the bankrupt, with the understanding that the avails thereof would enure to the benefit of the bankrupt's estate. In 1935, one year after the appointment of the trustee, he determined to substitute other attorneys in place of the Buckley firm. Thereafter, upon motion made by the trustee in the state court, an order was entered granting substitution and fixing the lien of the displaced attorneys at 30% of any recovery obtained in the action. Subsequently the case was settled for $40,000, and the Buckley firm applied to the state court for an order directing defendants to pay them the amount of their lien. The trustee thereupon applied to the bankruptcy court for an order enjoining the attorneys from taking any steps in the state court to enforce their lien. He contended in his application that the state court was "without jurisdiction to adjudicate the value of their [Buckley & Buckley's] lien"; that "the avails of the action belong to the Trustee in Bankruptcy and are within the custody of the United States District Court for

the District of Connecticut" and that the proceeding sought to be enjoined "constitutes an interference with the jurisdiction of that Court in its paramount right to administer the bankrupt's estate" (Rec. on App., ff. 19-24, 31).

The District Court granted the injunction on the ground that the state court had no jurisdiction (Rec. on App., ff. 211-213).

The Circuit Court of Appeals reversed and held that the District Court had no power to interfere with the Buckleys' lien or with their right to have it determined and enforced in the state court. Rejecting the argument of the trustee that the fixing of the lien constituted an interference with the exclusive jurisdiction of the bankruptcy court, the opinion (Judge LEARNED HAND) stated (p. 282):

> "* * * He [the trustee] could of course substitute other attorneys, as he did, and Buckley & Buckley were obliged to retire; but the substitution did not affect their charging lien under §475 of the Judiciary Law of New York, Consol. Laws, c. 30, or their possessory lien upon the papers.
>
> In spite of the fact that the jurisdiction of the bankruptcy court is usually described as 'exclusive', it may consent to have the interests of third persons in property of which the bankrupt had possession, adjudicated in a state court if that is more convenient. *Foust* v. *Munson S. S. Lines*, 299 U. S. 77, 57 S. Ct. 90, 81 L. Ed. 49; *Texas* v. *Donoghue*, 302 U. S. 284, 58 S. Ct. 192, 82 L. Ed. 264; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483, 60 S. Ct. 628, 84 L. Ed. 876; *In re Schulte-United, Inc.*, 2 Cir., 49 F. (2d) 264. As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated."

That this decision involved the identical issues presented here is plain from the petition for certiorari to this Court

by the trustee in the *Sherman* case in which he listed the questions involved, as follows (pp. 30-31):

> "The issues in the instant case raise several questions which are of the utmost importance, so that bankruptcy courts and their officers may know just what acts of theirs would constitute a consent that some other court determine questions which otherwise would rest solely in the jurisdiction of the bankruptcy court.
>
> These questions are as follows:
>
> 1. Where a bankruptcy court consents that a trustee prosecute an action *in personam* in the name of a bankrupt, does such consent carry with it the implied consent that the court in which such action is pending may determine claims to or liens against the proceeds of such action?
>
> 2. Where a trustee institutes, intervenes in, or continues in the name of a bankrupt, a plenary suit *in personam* for money damages, does the trustee thereby submit himself to the jurisdiction of the court in which such suit is instituted or is pending to the extent that such court may determine liens or claims, such as attorneys' liens, against the proceeds of such suit?
>
> 3. Where a trustee, with the consent of the bankruptcy court, allows to be continued in the name of a bankrupt a plenary suit *in personam*, with the understanding that the fruits of such suit shall inure to the benefit of the bankrupt's estate, does he thereby submit himself to the jurisdiction of the court in which such suit is pending so that he is liable for costs, or attorneys' fees, etc.?"

Certiorari was denied by this Court (314 U. S. 657 [1941]).

The decision in the *Sherman* case was applied by the same Circuit Court of Appeals in the *Cup Craft* decision referred to above (126 F. [2d] 472 [1942], *aff'g* 40 F. Supp. 927 [1941]), involving a bankruptcy proceeding under Chapter XI of the Chandler Act. It was also cited and

quoted with approval by the Eighth Circuit Court of Appeals in *Ohio Oil Company* v. *Thompson, supra.* See also *In re Austin,* 42 F. Supp. 889 (E. D. N. Y., 1942).

To avoid the effect of the *Sherman* decision the Trustees attempted to distinguish it from the situation at bar. They are unable to do so.*

---

* 1. It was urged that the attorneys in the *Sherman* case were not appointed by the bankruptcy court but by the company that went into bankruptcy. It appears, however, in the *Sherman* opinion that the trustee "procured the consent of the bankruptcy court * * * that the action should be continued in Gould's name." In effect, the *Buckley* firm actually represented the trustee until other attorneys were substituted—a period of one year; and, as Judge HAND stated, "we deal with the case as though he [the trustee] had been openly the party plaintiff".

2. It was further contended that the lien in the *Sherman* case was for services performed prior to bankruptcy, whereas here they were rendered to the Debtor and the Trustees after the institution of the reorganization proceedings. In the first place, since the *Buckley* firm continued to represent the trustee subsequent to his appointment, it must be assumed that the lien fixed by the state court included services rendered after the bankruptcy proceedings and there is nothing in the record to the contrary. Moreover, an examination of the opinion, record and briefs in the *Sherman* case, and the petition for *certiorari* to this Court setting forth the questions presented, quoted above, shows that the fact that services were performed before or after bankruptcy was not the basis upon which the decision was reached. See also *In re Prudence Co.*, discussed *infra*, pp. 22-3, in which concededly the important services performed by the attorney for which the court stated he had a charging lien were rendered subsequent to the institution of the reorganization proceedings and the appointment of the trustees.

3. An effort is made to distinguish the *Sherman* case on the ground that the Attorneys in the case at bar were not discharged but had fully performed their services. First, this is contrary to the facts found by the Supreme Court and the Appellate Division which are supported by the Record. Secondly, the suggestion that an attorney's lien is extinguished upon completion of his services and the entry of judgment, thus permitting unconscionable clients to appropriate the fruits of the attorney's labors, is contradicted by the history of attorneys' liens and the decided cases in New York. See, *e. g.*, *Matter of King*, 168 N. Y. 53, *supra.*

In re Prudence Co.

The principle enunciated in the *Sherman* case was approved in *Re Prudence Company Inc., supra,* which involved a company in reorganization under Section 77B of the Bankruptcy Act (96 F. [2d] 157, *cert. den.* 305 U. S. 616). In that case, at the time of the appointment of the trustees by the bankruptcy court, there was pending a plenary action in the name of the debtor to recover upon a surety bond. The trustees requested the attorney prosecuting the case to consent to continue the litigation upon condition that his fees would be fixed by the bankruptcy court. The attorney refused to accept this condition. The trustees nevertheless permitted the attorney to continue to prosecute the action in the name of the debtor with the intention, as the Court found, "of taking the benefit of any recovery which the debtor might make" (p. 159).

The attorney performed the most important services in connection with the litigation *subsequent* to the institution of the reorganization proceedings and the appointment of the trustees; he tried the action and obtained a substantial judgment.

Judge SWAN, after discussing the lien rights of the attorney, categorically stated (p. 160):

> "Success having been achieved, they [the trustees] can reap the benefit of the judgment, but they take it subject to the attorneys' charging lien."

On the basis of the foregoing authorities it is manifest that the Trustees in the present case are subject to the New York Attorneys' Lien Law by virtue of the fact that the suits were brought in the State Court with the authority of the Bankruptcy Court.

The decision of the Court of Appeals that the State Court is precluded by the Constitution and Chapter X of the Bankruptcy Act from determining and enforcing the lien involves a complete nullification of State lien laws

so far as bankrupts or debtors in reorganization and their trustees are concerned, and clothes them with an immunity from the operation of State laws not possessed by any other litigant. This result is inconsistent with the adjudicated cases and constitutes a radical departure from long-established rules and policy. It finds no support in the express provisions of the Constitution or the federal reorganization statute; nor will such drastic change be implied from any such provisions.* See, *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939); *Emil* v. *Hanley*, 318 U. S. 515, 521 (1943); *Marine Harbor Properties* v. *Manufacturers Trust Co.*, 317 U. S. 78, 83 (1942); *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627 (1925); Point IV, *infra*. In the language of this Court† we say:

> "Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act."

POINT II

The attempt by the Trustees to substitute themselves in place of the Attorneys in charge of the suits in the State Court subjected the Trustees to such conditions as that Court might impose, including the fixing and enforcement of the Attorneys' liens.

An additional basis for the jurisdiction of the State Court to fix the Attorneys' liens arises from the acts of the Trustees in seeking to substitute themselves for the Attorneys in the New York suits. This is evidenced by the Trustees' letter to the Attorneys dated June 3, 1941 (R. 22-23). Particular attention is directed to the following language:

---

* The federal statutory provisions which it is alleged affected the Attorneys' rights under the New York Judiciary law are discussed in detail Point IV *infra*, p. 36 et seq.

† *Botcler* v. *Ingels*, 308 U. S. 57, 61 (1939).

"* * * we have decided that it is our duty as Trustees to assume the burden ourselves of taking over, preparing and arguing the pending appeals and any additional appeals that may be taken from any judgment that may be entered as a result of the hearings before Referee Dunn. We shall also act directly in the efforts which are being made to collect against C. K. Reynolds, Woodward and others.

* * * we feel compelled to take over all pending matters that are in your hands, except the conduct of the hearings before Referee Dunn.

* * * we shall relieve you henceforth of the burden and responsibility of the litigation. * * *"

The Attorneys in their reply of June 4, 1941 (R. 23-24), addressed to the Trustees, stated in part:

"Nevertheless, * * * we are prepared to accede to your wishes, provided:

1. We are relieved of our responsibilities, and

2. Our fees and disbursements to date are paid in full."

In the stipulation between the Attorneys and the Trustees, marked "So Ordered" by the Bankruptcy Court in the reorganization proceedings (R. 24-26), it was provided:

"Respondents [the Attorneys] will consent to the substitution of petitioners [the Trustees] or other attorneys in place and stead of respondents in all pending actions on behalf of petitioners upon such terms and conditions as shall be fixed by the courts of New York, or * * * by the appropriate court * * *."

It is undisputed that the Attorneys, after the entry of judgment in Action No. 1, ceased functioning as counsel for the Trustees in that action and that all further steps, including the proceedings to collect the judgment and the settlement with some of the defendants, were taken by the Trustees.

Justice WALTER in his opinion held this whole transaction to be an attempt by the Trustees to secure a substitution and supplant themselves (both being engaged in the practice of law) in place of the Attorneys. He stated in overruling the Trustees' objection to the jurisdiction of the State Court that they "cannot avoid such submission by the device of discharging their attorneys even though they refrain from formally moving for the substitution which they in effect seek" (R. 99). Neither the Appellate Division, which affirmed without opinion, nor the Court of Appeals, which reversed on the opinion of Judge FINCH, disturbed this finding in any respect.

In *Sherman* v. *Buckley, supra,* Judge HAND, after referring to the fact that the trustee intended to prosecute the action by new attorneys, stated (p. 282):

> "when he determined to do that, he necessarily subjected himself to the procedure of the state court, of which the substitution of attorneys was a part. He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit. * * * As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve; among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated."

POINT III

Under Section 77B, in effect when Action No. 1 was instituted, jurisdiction over such action and its incidents was never in the Bankruptcy Court but became vested exclusively in the State Court.

In the preceding arguments it has been assumed that the Bankruptcy Court initially had jurisdiction over the causes of action in favor of the Debtor and surrendered its jurisdiction to the State Court.

However, with respect to Action No. 1, the principal action, which was commenced in the State Court while Section 77B was in effect (as distinguished from Action No. 2 and the Globe Action instituted after the effective date of Chapter X, September 22, 1938), it is clear that jurisdiction was never vested in the Bankruptcy Court but became vested exclusively in the State Court. Consequently it was only that part of the assets recovered in the action, less the amount of the Attorneys' charging lien and other costs fixed by the State Court, that ever became subject to administration in bankruptcy.*

Thus, there is an important additional ground, relied upon by Justice WALTER, which sustains the jurisdiction of the State Court to fix the lien in Action No. 1.

---

* It should be noted that Action No. 1 can for this purpose be considered independent of the other two actions, for the order below fixed separate liens based upon the particular services rendered in each action, i.e., a lien for $100,000 in Action No. 1; $2,000 in Action No. 2 and $750 in the Globe Action (R. 6-8).

A. Since Action No. 1 was commenced while Section 77B was in effect, the jurisdiction of the Bankruptcy Court must be determined by that section.

The majority of the Court of Appeals adopted the argument of the Trustees and predicated their decision upon the provisions of Chapter X,* which it was claimed expanded the jurisdiction of the Bankruptcy Court beyond prior enactments so as to include causes of action in favor of the Debtor. However, the majority were in error in applying Chapter X to Action No. 1, for Chapter X, though adopted on June 22, 1938, did not become effective until September 22, 1938. Action No. 1 was commenced on August 4, 1938 while Section 77B was in effect.

That Section 77B was the proper statute to test the jurisdiction of the Bankruptcy Court in respect to Action No. 1 is clear. This is important, since it has been held that Section 23 of the Bankruptcy Act (limiting jurisdiction of the bankruptcy court) is applicable to Section 77B. Section 23 is expressly inapplicable to Chapter X.†

In *Re Standard Gas & Electric Co.*, 119 F. (2d) 658, 663 (C. C. A. 3rd, 1941), where a company in reorganization under Section 77B commenced a plenary action against former officers in June, 1938, prior to the effective date of Chapter X, the Third Circuit Court of Appeals held that jurisidiction of the bankruptcy court in respect to such action was determined by Section 77B, MARIS, C. J., stating (p. 663):

> "The provisions of Chapter X are made applicable to reorganization proceedings but are not extended to plenary actions involving controversies at law or in equity instituted before the effective date of that chapter."

---

* Pub. L. No. 696, 75th Congress. Approved by the President June 22, 1938. 52 Stat. 840, 883.

† See Bankr. Act, Section 102.

Similarly in *Tilton* v. *Model Taxi Corp.*, 112 F. (2d) 86, 88 (C. C. A. 2d, 1940) (PATTERSON, C. J.), the Circuit Court of Appeals for the Second Circuit stated:

> "* * * In the Chandler Act (11 U. S. C. A. §502) it is provided that section 23 of the Bankruptcy Act shall not be applicable to proceedings under Chapter X, and it may be that the District Court would have jurisdiction of an action of the present sort brought by a trustee appointed under that chapter, even where the defendant did not consent. The Chandler Act did not take effect until after joinder of issue in the present action, and we see no occasion to discuss whether the jurisdiction of the court has been broadened by the later legislation."

These decisions are in conformity with the principle stated in the headnote of the decision of this Court in *Fraenkl* v. *Cerecedo*, 216 U. S. 295 (1910) that: "Jurisdiction is determined as of the time of commencement of the suit, and even though the jurisdiction of the court be enlarged by a subsequent statute so as to include the parties, the Court cannot acquire jurisdiction against objection."

Indeed, it would appear that an interpretation of Chapter X which would give it retroactive operation so as to impair or destroy the Attorneys' liens herein which had previously attached at the commencement of Action No. 1, would render the Federal statute unconstitutional in depriving the Attorneys of property without due process of law.

B. Under Section 77B the Bankruptcy Court had no jurisdiction over *in personam* claims of a debtor against third persons.

1. THE LAW IMMEDIATELY PRIOR TO SECTION 77B.

Before the enactment of Section 77B the rule was well established that causes of action in favor of a bankrupt against third persons for an accounting and personal judgment did not come within the *summary jurisdiction* of the bankruptcy court because it constituted an "adverse claim"

which was not in the possession of that court. *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426 (1924); *Kelley* v. *Gill,* 245 U. S. 116 (1917); *Park* v. *Cameron,* 237 U. S. 616 (1915).

Moreover, by virtue of Section 23 of the Bankruptcy Act the bankruptcy court was excluded from entertaining *plenary* jurisdiction over such causes of action. This Court in *Schumacher* v. *Beeler,* 293 U. S. 367, 374 (1934), in an opinion which examined the legislative history and purpose of Section 23, stated:

> "In enacting §23, it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of §2 of the Act of 1867. The purpose was to leave such controversies to be heard and determined for the most part in the state courts 'to the greater economy and convenience of litigants and witnesses'."

See also: *Bardes* v. *Haworden Bank,* 178 U. S. 524 (1900); *Bush* v. *Elliott,* 202 U. S. 477, 483 (1906); *Park* v. *Cameron,* 237 U. S. 616 (1915); *Remington* on Bankruptcy, 4th Ed., Vol. 5, Sec. 2189, p. 316.

It is thus clear that while Congress had the power under the constitutional provision relating to bankruptcies to confer upon the bankruptcy court jurisdiction over causes of action in favor of the bankrupt (*Taubel-Scott-Kitzmiller Co.* v. *Fox, supra*), it fixed as its policy, embodied in Section 23, that jurisdiction of such causes of action should be in the state courts except where federal jurisdiction might be otherwise invoked.

2. SECTION 23 AND THE LIMITATIONS UPON THE BANKRUPTCY COURT'S JURISDICTION OVER IN PERSONAM ACTIONS ARE APPLICABLE TO 77B PROCEEDINGS.

Subdivision (k) of Section 77B (48 Stat. 921, 11 U. S. C., § 207[k]) lists several sections of the Bankruptcy Act

which are expressly made inapplicable to reorganization proceedings. Section 23 is not one of the sections so listed. Subdivision (k) further provides that all other provisions of the Bankruptcy Act are applicable "except such as are inconsistent with the provisions of this Section 77B." See *Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160, 163 (1936); *O'Connor* v. *Mills*, 300 U. S. 26, 27 (1937).

Every Circuit Court of Appeals in which the question has arisen has held that Section 77B was not inconsistent with Section 23 and that the same pre-existing limitations upon the jurisdiction of the bankruptcy court still existed in connection with the enforcement of personal claims in favor of a debtor.

Thus, in *Re Standard Gas & Electric Co.*, 119 F. (2d) 658 (C. C. A. 3d, 1941), a decision directly in point, a trustee of a company in reorganization under Section 77B in the District Court of Delaware commenced an action in that Court prior to the effective date of Chapter X against former officers and directors for breach of their duties as fiduciaries and prayed for an accounting and money judgments. Service of process was made in Delaware upon the resident defendants and service was made upon the non-resident defendants by process issued outside the State. The resident defendants moved to dismiss the complaint on the ground that under Section 23 the District Court did not have jurisdiction of the causes of action. The non-resident defendants also moved to vacate service for lack of personal jurisdiction. The District Court (NIELDS, J.) found that under Section 23 the Court did not have jurisdiction of the suits.*

The Circuit Court of Appeals for the Third Circuit, per MARIS, C. J., in a comprehensive opinion sustained the ruling below.

---

* The Court also found that personal jurisdiction had not been acquired over the non-resident defendants and was sustained in that ruling by the Circuit Court.

Addressing himself to a provision in subdivision (a) of Section 77B said to have been inconsistent with Section 23, namely, that the Court had jurisdiction of "property wherever located"—which this Court also had occasion to consider in *Palmer* v. *Massachusetts*, 308 U. S. 79—Judge MARIS stated (pp. 661-662):

> "In a broad sense a claim by a debtor against a third person is property of the debtor. As such the reorganization court may direct its prosecution by the trustee of the debtor if it is appropriate to do so in order to effect the debtor's reorganization. But it is a species of property which may only be realized upon for the benefit of the debtor and its creditors by the successful prosecution of a plenary suit against the third persons involved. We have seen that section 77B does not purport to confer jurisdiction over those persons. Such claims must therefore be enforced by plenary suits brought in courts whose existing jurisdiction is appropriate to entertain them. * * *
>
> It is true that the jurisdiction conferred by section 77B is over the debtor's property 'wherever located,' and that in this respect the section departs from the earlier provisions of section 2, sub. a which restricted the summary jurisdiction of the courts of bankruptcy to 'their respective territorial limits.' Under those earlier provisions it was necessary for a trustee in bankruptcy to institute ancillary proceedings in other districts in order to deal with property of the bankrupt located in those districts. Subdivision (20) of Section 2, sub. a expressly confers such ancillary jurisdiction upon courts of bankruptcy. It was to eliminate the necessity for such expense and time consuming ancillary proceedings that Congress conferred upon the reorganization court jurisdiction over the debtor's property 'wherever located.' This is clear from the legislative history of the Act of June 7, 1934, c. 424, 48 Stat. 912, which added Section 77B to the Bankruptcy Act" [footnote, quoting from report of the House Committee on the Judiciary, 73rd Con., 1st Sess., House Report 194]. We think it is equally clear that Congress did not intend to ignore the distinction theretofore recognized in the Bankruptcy Act between jurisdiction over persons and jurisdiction of property—

between proceedings in personam and in rem—and that subdivision a of section 77B did not affect the existing jurisdiction of the bankruptcy courts over the former or conflict with the restrictions which section 23 placed upon that jurisdiction."

The Court then considered the effect of another provision in subdivision (a) of Section 77B which was also claimed to have been inconsistent with Section 23, i.e., that the bankruptcy court shall have the powers of a court appointing a receiver in equity (p. 662):

> "This reference to the powers which a federal equity court exercises when it appoints a receiver is to the substantive powers which such a court exercises over the property in its custody rather than to its jurisdiction to entertain plenary suits growing out of the receivership. Finletter, Principles of Corporate Reorganization, page 187. This becomes clear when subdivision a is considered in the light of subdivision o of section 77B which reads: 'In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved.'"

In *Re Prima Co.*, 98 F. (2d) 952 (1938), the Circuit Court of Appeals for the Seventh Circuit reached the same conclusion. To the argument that there was an inconsistency between Section 23 and subdivision (a) of Section 77B, the Court, examining the purpose of this subdivision, stated (p. 958):

> "* * * This was done in order to eliminate cumbersome and expensive ancillary proceedings, and to enable the court to operate the property and conduct the business of the debtor pending the reorganization. Moreover, a construction extending the jurisdiction of the District Court to all controversies between the

debtor and adverse party claimants would, to the extent of the operations of section 77B, amount to a repeal by implication of section 23. It is not contended that there is an express repeal and we think subdivisions (k) and (o), 11 U. S. C. A., § 207(k, o), clearly negative a repeal by implication."

Certiorari was denied by this Court *sub. nom. Keig* v. *Harris Trust & Savings Bank*, 305 U. S. 658 (1939).

In *Re Prudence Bonds Corp.*, 75 F. (2d) 262 (1935), Judge LEARNED HAND of the Circuit Court of Appeals for the Second Circuit observed (p. 263):

"It is clear both from the language used in these subdivisions [(a) and (o)] and from the consequences of a contrary ruling, that Congress did not intend the bankruptcy court in proceedings under section 77B to take over all litigation between the debtor and third persons."

In *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1 (1939), the Eighth Circuit Court of Appeals, per SANBORN, C. J., reaffirmed the rule in the preceding cases, stating (p. 6) that a court of bankruptcy in proceedings under Section 77B "is without power to bring into the bankruptcy proceedings adverse claimants, whether within or without the district."

The Court further held that the same rule obtained under Section 77, relating to reorganization of railroads, whose legislative history was parallel to that of Section 77B (p. 9):

"* * * We think that the jurisdiction conferred by Section 77 upon the courts of bankruptcy is not to be regarded as general, plenary, nationwide jurisdiction at law and in equity over all questions incident to the collection of the claims of the debtor against third persons, but is to be considered as the traditional jurisdiction of such courts over the property of a bankrupt, wherever located, freed, however, from those limitations which made ancillary proceedings in other

districts necessary, and with the powers which Federal equity courts exercise in receivership proceedings, so far as those powers may be necessary or appropriate in order to preserve and safeguard the property in the actual or constructive possession of debtors and in order to carry on their business pending reorganization."

Certiorari was denied by this Court, 306 U. S. 652 (1939).

See also: *Tilton* v. *Model Taxi Corp.*, 112 F. (2d) 86 (C. C. A. 2d, 1940), *supra; In re Mount Forest Fur Farms of America, Inc.*, 122 F. (2d) 232 (C. C. A. 6th, 1939); *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363 (C. C. A. 9th, 1936); *Finletter*, Principles of Corporate Reorganization (1937), pp. 186-187.

It is thus clear that the Bankruptcy Court under Section 77B did not have either plenary or summary jurisdiction to entertain the causes of action in favor of the Debtor.

In addition to this lack of jurisdiction over the subject matter, the Bankruptcy Court's jurisdiction over such causes of action was further limited in the following essential respects:

1. It could not obtain personal jurisdiction over non-resident defendants because its process could not extend beyond its own territorial borders. See discussion of this point by MARIS, J., in *In re Standard Gas & Electric Company, supra*, pp. 663-665; see also, *Bovay* v. *H. M. Byllesby & Co.*, 88 F. (2d) 990 (C. C. A. 5th, 1937).

2. The appointment of a trustee for a debtor did not operate to stay pending suits in the state court such as Action No. 1 commenced prior thereto; nor did the Trustee by the mere fact of his appointment become a party to every lawsuit in which the Debtor was a plaintiff. If he desired to share in the recovery of any such suit he was permitted under Section 11(c) of the Bankruptcy Act, which was applicable to 77B proceedings, to be substituted as a party plaintiff in the State suit "with like

force and effect as though it had been commenced by him" or to "allow the suit to be continued by the bankrupt and later claim the fruits of any recovery." *In re Prudence Co.*, 96 F. (2d) 157, 159 (C. C. A. 2d, 1938), *cert. den.* 305 U. S. 316 (1938), *supra.*

3. The state court in which the Trustee was compelled to proceed had control of every phase and incident of the suit. For example, it had the power to cause the examination of third parties, to determine whether the claim should be tried by court or jury, to adjudicate the amount owed the Debtor by the third person, to impose statutory costs and fees on all parties, including the Trustee, to issue execution and to invoke proceedings supplementary to execution.

Since, therefore, the State Court legally and actually had sole power and jurisdiction over Action No. 1, Justice WALTER was entirely correct in stating (R. 107) that:

> "It is, indeed, a little short of an absolute contradiction to say that a bankruptcy court has possession of something which the trustee must go into another court in order to get."

It would therefore seem to follow conclusively that Judge FINCH was in error when he stated that the causes of action constituted assets within the exclusive jurisdiction of the Bankruptcy Court and that the New York lien proceedings invaded that jurisdiction. To the contrary, Action No. 1 was within the exclusive jurisdiction of the State Court from the moment it was instituted, and it was only that part of the funds recovered in the action which remained after the deduction of the amount of the charging lien and other statutory costs that ever became an asset subject to the Bankruptcy Court's jurisdiction. This is in exact accord with *In re Prudence Co.*, discussed above, pp. 22-3, in which the Second Circuit Court of Appeals, referring to a plenary suit in favor of a debtor in 77B proceed-

ings, stated: "Success having been achieved, they [trustees] can reap the benefit of the judgment, but they take it subject to the attorney's charging lien." Similarly, in *Re Bay Ridge Inn*, 94 F. (2d) 555, 557 (C. C. A. 2d, 1938), in which a trustee in bankruptcy claimed that the bankruptcy court had jurisdiction of a claim for refund against the New York Liquor Authority, the following language of Judge AUGUSTUS HAND is particularly apposite:

> "The refund is not an asset in the hands of the bankrupt unless and until the Authority, subject to review by the New York court, shall award it to the trustee in accordance with the terms of the act. The right to reinstatement or to a refund depends wholly upon the action of the state tribunals and is in no way within the control of the bankruptcy court. Any rights or privileges of the trustee were created by the New York Legislature and were subject to such conditions as it might impose."

In conclusion, it is submitted that in Action No. 1 (the principal suit) the determination of the Attorneys' lien by the State Court could not invade the exclusive jurisdiction of the Bankruptcy Court for two reasons: First, this cause of action was not within the jurisdiction of the Bankruptcy Court; second, if it were, that Court surrendered its jurisdiction to the State Court by directing the prosecution of the suit there.

POINT IV

Neither the Constitution nor the Federal reorganization statutes prohibit the State Court from fixing liens upon causes of actions prosecuted in that Court with the authorization of the Bankruptcy Court.

The decision of the Court of Appeals is predicated solely upon the ground that the causes of action in favor of the Debtor were assets within the jurisdiction of the Bank-

ruptcy Court by virtue of Chapter X of the Bankruptcy Act and that the fixing of attorneys' liens by the State Court invades this jurisdiction. In reaching this result the majority adopted the argument advanced by the Trustees that Congress through the enactment of Chapter X has greatly expanded the jurisdiction of the Bankruptcy Court.

The effect of this decision is that Chapter X has completely nullified the local Attorneys' Lien Law and has conferred upon debtors in reorganization and their trustees who invoke the aid of New York courts a unique immunity from the State's laws to that extent.

Congress never intended any such result either by Section 77B or Chapter X.

A. Section 77B, not Chapter X, is applicable to Action No. 1. Under it there is no immunity to Trustees from local lien laws.

As shown above (Point III) Action No. 1 was commenced while Section 77B was in effect; yet the Court of Appeals erroneously considered the jurisdiction of the Bankruptcy Court as being under Chapter X instead of Section 77B. We have pointed out that Congress in the enactment of Section 77B did not depart from its long-established policy of having the state court, not the bankruptcy court, exercise jurisdiction of causes of action in favor of a bankrupt or debtor against third persons.

Prior to the enactment of Chapter X it was thus clear, as evidenced by the *Sherman*, *Prudence* and other authorities discussed *supra* (Point I), that the trustee in bankruptcy or reorganization was subject to the local attorneys' lien laws.

B. Chapter X has not conferred upon trustees in reorganization immunity from attorneys' lien laws.

Neither the majority of the Court of Appeals nor the Trustees was able to refer to a single provision in Chapter

X which effects the alleged radical change in the pre-existing law and precludes a state court from fixing liens upon causes of action prosecuted there with the authorization of the bankruptcy court. There is, of course, no such provision.*

In the absence of any express provision conferring an immunity upon trustees, the majority of the Court of Appeals was compelled to reach such result by implication from several sections of Chapter X. This was in direct violation of the admonitions of this Court that "Clearly, means of permitting such immunity from local laws will not be read into the Bankruptcy Act" (*Boteler* v. *Ingels*, 308 U. S. 57, 61 [1939]) and that "it is not lightly to be assumed that Congress intended to depart from a long established policy." *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627 (1925); *Panama Railroad Company* v. *Johnson*, 264 U. S. 375, 384 (1924); *In re East River Towing Co.*, 266 U. S. 355, 367 (1924).

The attitude of this Court was recently expressed in *Emil* v. *Hanley*, 318 U. S. 515, 521 (1943):

> "We cannot help but think that if Congress had set out to make such a major change, some clear and unambiguous indication of that purpose would appear."

Again in *Palmer* v. *Massachusetts*, 308 U. S. 79, 83-84 (1939), the Court pointed out that "especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority * * *"

---

* There is nothing to preclude a trustee under Chapter X from suing in the state courts or being substituted as a plaintiff in a suit instituted there by the debtor prior to the reorganization proceedings. On the contrary, this is expressly permitted by Section 11, subdivisions (c) and (e) of the Act which is applicable to Chapter X proceedings (Bankr. Act, § 102). When that choice is made, no provision in Chapter X prohibits the state court from obtaining full jurisdiction over the suit and its incidents.

Turning to the provisions upon which the majority of the Court of Appeals based its conclusion, it will be clear that the Court struggled, as did the trustees in *Palmer* v. *Massachusetts, supra,* to derive meaning "not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute", with the result that "what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself" (p. 83):

1. Great reliance was placed by the majority upon Section 111, which provides that the bankruptcy court shall "have exclusive jurisdiction of the Debtor and its property wherever located" (R. 125). This is not a new provision; it is a repetition of the exact words in subdivision (a) of Section 77B. Its purpose as shown above, pp. 31-4, was to eliminate ancillary receiverships.

Only recently this Court in *Palmer* v. *Massachusetts, supra,* pp. 85-6, rejected a contention that the identical clause in Section 77 gave power to the bankruptcy court to supplant a relevant State administrative tribunal in its decision relating to property belonging to the debtor in reorganization.

2. Section 114 was referred to, under which the jurisdiction of the bankruptcy court in Chapter X proceedings shall be the same as in bankruptcy proceedings upon adjudication. This provision also is not new. It "is patterned upon Section 77B(o) and does no more than simplify the language of the law." Senate Report No. 1916, Committee on the Judiciary, May 27, 1938, p. 24. That this section did not enlarge the jurisdiction of the bankruptcy court was expressly held in *Re Prudence Bonds Corp.*, 75 F. (2d) 262, 263 (C. C. A. 2d, 1935), *supra,* and in *Re Standard Gas & Electric Co.*, 119 F. (2d) 658, 662, *supra.*

3. The Court of Appeals referred to Section 256 of the Judicial Code (28 U. S. C. 371), which provides that the

Federal Court shall have exclusive jurisdiction of matters pertaining to bankruptcy, and cited the decisions of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342 (1933); *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 (1931), and *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940). Neither this section, which incidentally has been on the statute books since 1911,* nor any of these decisions militate against the operation of the New York Attorneys' Lien Law. They merely enunciate the undisputed proposition that once bankruptcy has intervened, the jurisdiction of the bankruptcy court is exclusive. They do not imply that after the bankruptcy court has assumed its exclusive jurisdiction it cannot consent or authorize the institution of proceedings in a state court. The contrary is the case. Thus, in *Isaacs* v. *Hobbs Tie & Timber Co.*, *supra*, this Court, after speaking of the "exclusive" jurisdiction, added the significant qualification "save by consent of the bankruptcy court" (p. 739). Likewise in *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483, this Court, after referring to the "exclusive and non-delegable control over the administration of an estate in its possession", continues in the next sentence, "But the proper exercise of that control may * * * lead the bankruptcy court to consent to submission to state courts of particular controversies * * *." Or, as was stated in *Ex parte Baldwin*, 291 U. S. 610, 619 (1934), "Moreover, the bankruptcy court might, in the exercise of its discretion, conclude that it is desirable to have the litigation proceed in the state court." Indeed, it has been held that the refusal of a bankruptcy court to allow state courts to determine certain questions arising in connection with bankruptcy matters may constitute an abuse of discretion. *Foust* v. *Munson S. S. Lines*, 299 U. S. 77 (1936); *State of Texas* v. *Donoghue*, 302 U. S. 284 (1937).

---

* R. S., § 711, March 3, 1911, c. 231, § 256; 36 Stat. 1160.

4. The opinion of the Court of Appeals finally refers to miscellaneous sections of Chapter X (Secs. 241-250) relating to the power of the bankruptcy court over fees, expenses and allowances and the conditions which must be complied with for the payment thereof, and to Section 206 permitting interested parties to be heard.

It is manifest that these sections as well as Section 62, the corresponding section applicable to straight bankruptcy, relate solely and exclusively either to allowances for services rendered within the bankruptcy court itself, e. g., in connection with a plan of reorganization, or to allowances from funds in the possession of the bankruptcy court. There is nothing in these provisions which refers to or tends to limit such *in rem* rights as attorneys may have under local law upon actions and the proceeds thereof within the jurisdiction and custody of the state court. Nor did Congress intend these sections to have any such effect, as is evidenced by the description, derivation and purpose of the sections contained in Senate Report No. 1916 of the Judiciary Committee dated May 27, 1938, in connection with the Chandler Bill, quoted in the margin.* This is further demonstrated

---

* "COMPENSATION AND ALLOWANCES:

Section 241, derived in part from section 77B(c)(9), vests the judge with the power to make allowances, for services and for costs and expenses, to referees, special masters, trustees and their attorneys, and to attorneys for the debtor and for petitioning creditors. The latter may themselves be allowed only their proper costs and expenses. Sections 40 and 48 of the act, as relating to the compensation of referees and trustees, are made inapplicable to this chapter.

Section 242, derived in part from section 77B(c)(9), vests the judge with the power to make allowances to any parties in interest, to security holders' representatives, and to their respective counsel and agents, for services rendered or disbursements incurred in connection with the administration of the estate or with a plan approved by the court. These may be made, in the discretion of the judge, even though the plan may not be confirmed, and a liquidation is directed or the proceeding is dismissed.

Section 243 empowers the judge to grant allowances to creditors and stockholders, and their attorneys, for services and expenses incurred in connection with their submission of plans or suggestions therefor, or their objections to confirmation of a plan, or the admin-

by the fact that in spite of the existence of Section 62 it was held in *Sherman* v. *Buckley*, and the other authorities discussed in Point I, that jurisdiction to fix charging liens of attorneys on causes of action was lodged in the state court and not in the bankruptcy court.

As an indication that Congress, in the enactment of Chapter X, and particularly the sections governing allowances, intended to preclude the state courts from fixing

---

istration of the estate. These must contribute to the plan confirmed or to the refusal of confirmation of a plan, or be beneficial to the administration of the estate, if such allowance is to be granted.

Sections 244 and 245 deal with compensation and reimbursement for services and expenses in a bankruptcy proceeding which is superseded by a reorganization proceeding.

Section 246 deals with compensation and reimbursement for services and expenses in the event of dismissal or liquidation ordered in the reorganization proceedings.

Section 247 deals generally with hearings, and adequate notice with respect thereto, in the matter of allowances under this article.

Section 248 provides that where a reorganization proceeding supersedes a bankruptcy proceeding, and the former is then dismissed and bankruptcy proceeded with, allowances in the bankruptcy proceeding are to be governed by the rules applicable to such type of proceeding.

Section 249 forbids the granting of allowances to persons acting in a representative or fiduciary capacity who deal in securities of the debtor during the pendency of proceedings under this chapter, except as the judge may approve or consent to an acquisition or transfer thereof in an unusual case. This section is in the main a codification of the rule already imposed by the courts in proceedings under section 77B.

Section 250, derived from section 77B(c)(9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record. * * *

Section 206, derived in part from section 77B(c), gives any creditor or stockholder, any indenture trustee, and the debtor, the right to be heard on all matters in the proceeding. Existing restrictions on such right to be heard are eliminated as being undesirable. It also allows a labor union of employees of the debtor, in the discretion of the judge, to be heard on the economic soundness of the plan affecting the interests of the employees."

See also H. Report No. 1409 of Mr. Chandler of the Committee on Judiciary, 75th Congr., 1st Sess., July 29, 1937, pp. 45-46.

the liens, Judge FINCH suggested that a contrary ruling would put the disposition of the bankrupt's assets into the hands of a tribunal concerned solely with the rights of the litigants before it, unrestrained by provisions for notice to other interested parties, and unfamiliar with the status of the bankrupt's estate. This is hardly an answer to the question of whether Chapter X was intended to grant immunity to bankruptcy trustees from the operation of the New York Attorneys' Lien Law. Nevertheless, the result so envisioned is neither unusual nor dangerous. Thus, when a trustee brings a plenary suit in a state court against the bankrupt's debtor, the latter may plead and prove any counterclaim that would have been permitted against the bankrupt, so long as it does not interfere with property in the possession of the bankruptcy court or violate the restraint of an order of such court. And the determination by the state court of the merits of the counterclaim is just as binding upon the trustee and the bankrupt's estate as if the counterclaim had been heard and allowed by the bankruptcy referee upon notice to all interested parties to the bankruptcy. (See in addition to authorities cited *supra*, pp. 16-17, *Northeastern R. E. Sec. Corp.* v. *Goldstein*, 276 N. Y. 64 [1937]). Yet neither Congress in the Bankruptcy Act and the amendments thereto, nor any court in construing them, has held such a determination to be fraught with danger to the safeguards provided for in the Bankruptcy Act in the hearing and allowance of claims. It is, of course, indisputable that the trustee as the duly constituted representative of all the parties is in the position to present in the state court any matter tending to reduce or defeat the claim on the merits.

It is thus clear that the drastic change of nullifying local attorneys' lien laws cannot be found in any of the provisions of Chapter X either expressly or by implication. Moreover, the legislative reports accompanying Chapter X are barren of any complaints that the lack of jurisdiction of the bankruptcy court over liens upon causes of action prosecuted in the state courts had prejudicially

affected reorganization proceedings or that the proposed amendments relating to jurisdiction were intended to confer any additional powers upon courts of bankruptcy in such respect. This is an extremely significant circumstance for a matter is "not within the statute unless it be within the intention of the makers." *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1, 8 (C. C. A. 8th, 1939), *supra*. Furthermore, none of the text writers who have analyzed the changes made by Chapter X has intimated that the major changes relied on by the Court of Appeals and by the Trustees were effected.*

Finally, the decision of the Court of Appeals if permitted to stand leads to highly undesirable consequences never anticipated by Congress. It amounts to an unwarranted federal interference with local authority which, according to this Court's decision in *Palmer* v. *Massachusetts, supra,* should be carefully avoided. It results in a division of jurisdiction between the state and federal courts over actions prosecuted in the former courts, in that the state courts will control many of the phases of the litigation while the federal court will retain control over one of the important incidents, that of determining the charging lien of the local attorney upon the action. This Court in *Emil* v. *Hanley, supra,* unequivocally stated that "an interpretation which leads to a division of authority so fraught with conflict will not be readily implied" (p. 521).

---

* *Finletter*, The Law of Bankruptcy Reorganization (1939), Chap. 3, p. 115 *et seq.*; *Douglas*, Improvement in Federal Procedure for Corporate Reorganizations, 24 Amer. Bar Assn. Journal, p. 875 (November 1938); *Weiner*, Corporate Reorganizations under the Chandler Act, 72 U. S. Law Rev., p. 388 (July 1938); *Doub*, Corporate Reorganizations under Chapter X of the National Bankruptcy Act, 3 Maryland L. Rev., p. 1 (Dec. 1938); *Teton*, Reorganization Revised, 48 Yale L. Journal, 573 (Feb. 1939); *Laporte*, Changes in Corporate Reorganization Procedure, proposed by the Chandler and Lea Bills, 51 Harv. L. Rev., p. 672 (February 1938); *Gerdes*, Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev., p. 1 (Nov. 1938).

While Congress unquestionably had the power to effect such an undesirable result it did not do so. As this Court (per Mr. Justice DOUGLAS) stated in *Marine Harbor Properties* v. *Manufacturers Trust Co.*, 317 U. S. 78, 83 (1942):

> "The federal bankruptcy power is, of course, paramount and supreme and may be so exercised by Congress as to exclude every competing or conflicting proceeding in state or federal tribunals. Kalb v. Feuerstein, 308 U. S. 433. In fashioning Chap. X Congress, however, did not go so far."

POINT V

The determination and enforcement of the Attorneys' liens by the State Court is not inconsistent with any alleged contract or agreement made by the Attorneys with the Trustees or the Bankruptcy Court.

The principal arguments of the Trustees and the majority of the Court of Appeals have been answered in the preceding points. One further contention was advanced by the Trustees which is entirely without foundation.

In an attempt to make it appear that a local and not a federal question is presented on this appeal, the Trustees in their brief in opposition to the petition for *certiorari* (Point I) stated that "The primary issue is not as to whether a state court may enforce a lien for services rendered by attorneys in a state court action, but whether the state court, in determining the amount for which a lien, if any, shall be enforced, *must* disregard the contract of the attorneys under which they agreed that the amount of their compensation would be fixed by the federal reorganization court"; and they urged that the lien granted the Attorneys under Section 475 of the Judiciary Law was waived by such contract, which is permissible under Section 474 of the Judiciary Law. The contract according to the Trustees is to be found in the Plan of Reorganization of the Debtor and the orders of the Bankruptcy Court confirming the Plan.

It should be pointed out that any claim of contract was a matter of defense to be pleaded and proved at the trial. Such contention, therefore, cannot properly be considered, as it goes to the merits of the lien and not to the jurisdiction of the State Court to fix the lien or the jurisdiction of this Court to entertain certiorari.

In any event, the contention based upon such alleged contract was urged in the State Court and expressly overruled by Justice WALTER (R. 108-109) and the unanimous affirmance of the Appellate Division. These findings were undisturbed by the Court of Appeals.

Considering the question *de novo*, there are three conclusive answers given by the State Court to the argument that an actual agreement was made by the Attorneys through the adoption of the Plan of Reorganization: (1) The Attorneys were never parties to the Plan of Reorganization or the order confirming it; (2) there is nothing in the Plan, which was promulgated one and a half years after Action No. 1 was instituted and consummated two years thereafter, purporting to affect or destroy the lien rights of the Attorneys which crystallized from the commencement of action; and (3) the discharge and substitution of the Attorneys cancelled any such alleged agreement had there been one.

1.

The Attorneys were never parties to the Plan of Reorganization. They participated in the reorganization proceedings and recommended the adoption and confirmation of the Plan *solely* in their capacity as counsel respectively for the principal debenture and preferred stockholders' committees (R. 55-56, 68-69). Moreover, the compensation which they received in the reorganization proceedings was solely for services rendered as attorneys for their respective committees in those proceedings and had no relation to their services in the New York actions.

2.

The Trustees cannot refer to a single provision in the Plan of Reorganization or the orders of the Bankruptcy Court confirming the Plan which can possibly be construed to nullify and destroy the lien rights of the Attorneys which under Section 475 of the Judiciary Law had attached many months before. At the time of the promulgation and confirmation of the Plan no question of the enforcement by the Attorneys of their liens upon the New York suits was considered or contemplated: It did not arise until June 3, 1941, almost a year after the Plan was confirmed, when the Attorneys were relieved of their duties.

The provision of the Plan upon which the Trustees principally relied is the one with respect to the right of the Bankruptcy Court to fix reasonable compensation to be paid to the Attorneys and their Trustees in connection with the prosecution of the claims of the Debtor. It is apparent that this section merely incorporates Section 241 of Chapter X referred to above, which provides that the Bankruptcy Judge may allow "reasonable compensation for services rendered * * * by the Trustee and other officers, and the attorneys for any of them." As shown above, this section of Chapter X and Section 62(d), the correlative section applicable to straight bankruptcy proceedings, which are embodied in the provision of the Plan, are concerned with the payment of compensation for services rendered within the Bankruptcy Court, or with applications for allowance from funds and assets within the custody and possession of the Bankruptcy Court. They are not concerned with the lien rights of the Attorneys upon specific *res*, the suits and proceeds thereof which are within the jurisdiction and custody of the State Court.

3.

Assuming the Attorneys had entered into an agreement to look solely to the Bankruptcy Court for their compensation, such alleged agreement was cancelled by their discharge and attempted substitution. Under the New York law, while a client has an absolute right to discharge his attorney without cause at any time, nevertheless, if he exercises this privilege, it operates to cancel any agreement which it is claimed existed and entitles the attorneys to have their liens fixed immediately by the Supreme Court on a *quantum meruit* basis under Section 475 of the Judiciary Law. *Matter of Tillman*, 259 N. Y. 133 (1932); *Matter of Weitling*, 266 N. Y. 184 (1935); *Matter of Montgomery*, 272 N. Y. 323 (1936).

As the Court of Appeals stated: "A client may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney [citing cases]. Even in the presence of a definite agreement the client's right persists. Cancellation by him cannot constitute a breach of contract, for implied in every such agreement is the right to discharge" (*Matter of Krooks*, 257 N. Y. 329, 331-332 [1931]). "The client is entitled to cancel his contract of retainer but such an agreement cannot be partially abrogated. Either it wholly stands or totally falls * * *" (*Matter of Tillman, supra*, pp. 135-136).

The Trustees contended that the Attorneys were not discharged but had completed the services for which they were retained. This contention was advanced in spite of the fact that (1) in Action No. 1 the Attorneys were notified that the collection of the judgments (the most important phase of all) was not to be handled by them but by the Trustees, and (2) in Action No. 2 and the Globe Action the Attorneys were relieved of their duties while the actions were still pending untried.

The Trustees urged that the authority of an attorney ceases upon entry of judgment. It is well settled under the New York law that an attorney's authority to represent

a party does not end upon entry of the judgment but continues to include the usual steps to collect the judgment and thereby accomplish the purpose of the retainer. *Ohlquist* v. *Nordstrom*, 143 N. Y. Misc. 502 (1932), *aff'd* 238 N. Y. App. Div. 766 (1933), *aff'd* 262 N. Y. 696 (1933). The Court of Appeals in *Larkin* v. *Frazier*, 224 N. Y. 421, 425 (1918), stated:

> "Under the general authority conferred upon the defendant he was authorized to prosecute the action commenced by him for Clara C. Larkin to final judgment and to enforce collection thereof by the issuance of an execution thereon, to receive the avails of the execution from the sheriff and also to acknowledge satisfaction of the judgment at any time within the statutory period. (*Barber* v. *Dewes*, 101 App. Div. 432, affirmed 184 N. Y. 548; *Read* v. *French*, 28 N. Y. 285; *Bathgate* v. *Haskin*, 59 N. Y. 533; *Steward* v. *Biddlecum*, 2 N. Y. 103.) Likewise he would be authorized to institute proceedings supplemental to execution on the judgment. (*Ward* v. *Roy*, 69 N. Y. 96.) * * * "

CONCLUSION

The order of the Court of Appeals should be reversed and the orders of the Supreme Court affirmed by the Appellate Division should be reinstated.

Respectfully submitted,

DAVID PAINE,
LAWRENCE S. GREENBAUM,
WILLIAM C. SCOTT,
Solicitors for Petitioners.

THEODORE S. JAFFIN,
JAMES F. DWYER,
of Counsel.